IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL MISCELLANEOUS APPLICATION NO. 39 OF 2002.

Shri Antonio Xavier Severino
D'Sa, r/at Diwar, Ilhas Goa. ... Applicant.

Versus

1. Fr. Freddy Jeremias da
   Costa, Parish Priest,
   Siridao Church, Siridao.
2. State of Goa through
   Public Prosecutor. ... Respondents.

Mr. Valmiki Menezes, Advocate for the Applicant.

Mr. M.S. Joshi, Advocate for the Respondent No. 1.

Coram : P.V. HARDAS, J.

Date : 26th June 2003.

ORAL JUDGMENT.

The applicant/original complainant, being aggrieved by the Judgment, dated 29th September 2001, delivered by the Sessions Judge, Panaji, in Criminal Revision Application No. 70 of 2000, quashing the Order of the learned Magistrate, dated 4th August 2000, issuing process against the respondent no. 1/accused for an offence punishable under Section 497 of the Indian Penal Code, has filed the present revision challenging the aforesaid Order.

2. The brief facts necessary for the decision of this revision application are set out hereunder:-

The respondent no. 1/accused, being aggrieved by the Order, dated 4th August 2000, passed by the

Judicial Magistrate, First Class, Mapusa, in Private Criminal Case No. 94/1989/B, issuing process against the respondent no. 1/accused for an offence punishable under Section 497 of the Indian Penal Code, filed Criminal Revision Application No. 70 of 2000 before the Sessions Judge, Panaji. Before the learned revisional Court, it was strenuously urged on behalf of the respondent no. 1/accused and the applicant therein that the learned Magistrate, after recording the verification statement of the applicant/complainant, had called for a police report under Section 202 of the Code of Criminal Procedure. The police report did not disclose any additional material and, therefore, the learned trial Court was not justified in issuing process against the respondent no. 1/accused. Before the revisional Court reliance was placed on the Judgment of the Supreme Court in **Mohammad Atullah v. Ram Saran Mahto**, A.I.R. 1981 S.C. 1155. In the aforesaid Judgment of the Supreme Court, the Supreme Court quashed the issuance of process on the ground that the report under Section 202 of the Code of Criminal Procedure did not disclose any additional material except what was already there when the learned Magistrate had ordered for a police report under Section 202 of the Code of Criminal Procedure. On this aspect, the learned revisional Court in paragraph 5 of the Judgment has held: "Admittedly, in this particular case before me, there was no additional

material before the trial Court after the receipt of the report from the Porvorim Police Station". The learned revisional Court then further observed that there was nothing in the report of the police to even remotely suggest that the accused was responsible for the pregnancy of the wife of the complainant.

3. On behalf of the complainant it was urged, before the revisional Court, that the accused may be directed to submit himself to DNA test and that the Courts had power to direct the accused to submit himself to DNA test. The learned revisional Court held that the accused could not be compelled to give his blood samples for analysis.

4. The revisional Court also found on perusal of the complaint and the verification statement that there was absolutely no prima facie material to hold that the accused had committed the offence punishable under Section 497 of the Indian Penal Code. The revisional Court, therefore, quashed the Order of issuance of process and dismissed the complaint. The complainant, being aggrieved by the aforesaid Order, has filed the present revision before this Court.

5. Records and proceedings have been called for by this Court. Perusal of the complaint would show that

admittedly, according to the applicant/complainant, he had left for Muscat on 22nd January 1990 and had returned from Muscat on 20th November 1990. Apparently, during his absence, his wife had conceived and had delivered a baby boy. Somewhere in May 1999, the aforesaid complaint for an offence punishable under Section 497 came to be filed. The perusal of the complaint and the verification statement would further show that the complainant had no personal knowledge regarding the facts which were averred in the complaint. It was averred in the complaint that the respondent no. 1/accused had illicit sexual relations with the wife of the complainant, due to which she had conceived and had delivered a child. Admittedly, according to the complainant, during that period he had gone abroad. The complainant chose not to examine any witness in support of the averments in the complaint. The Magistrate proceeded to issue process on the basis of the verification statement of the complainant and the police report received under Section 202 of the Code of Criminal Procedure.

6. Mr. Menezes, the learned counsel appearing on behalf of the applicant/original complainant, has urged before me that the police report had disclosed additional material and, therefore, the learned Sessions Judge was not right in applying the ratio of the

Judgment in Mohammad Atullah v. Ram Saran Mahto (supra) in dismissing the complaint by observing that no additional material was made out. According to the learned counsel for the applicant, the police had recorded the statements of some doctors, who are said to have examined the wife of the applicant/complainant when she was in the family way. Relying on this, it was urged that factually the police report did disclose additional material and, therefore, the learned trial Magistrate cannot be faulted for having issued process against the respondent no. 1/accused.

7. With the assistance of the learned counsel for the parties, I have perused the complaint, verification statement and the police report. An order issuing process is an extremely serious matter and the accused cannot be asked to undergo the rigours of a trial unless and until the complainant has placed prima facie material to warrant the issuance of process against the accused. In the present case, the learned revisional Court had also examined the material to find out if a prima facie case against the accused had been made out. I have also examined the material to test whether a prima facie case has been made out against the respondent no. 1/accused. Apart from the bald allegations, which have not been supported by any prima facie material, it is difficult to understand as to how

the learned trial Magistrate could have arrived at the conclusion that an offence under Section 497 of the Indian Penal Code had been made out. Obviously the averments in the complaint were not based on the personal knowledge of the complainant and, therefore, the complainant ought to have examined witnesses in support of the complaint. Therefore, the learned revisional Court was perfectly justified in coming to the conclusion that the complainant had failed to make out a prima facie case against the respondent no. 1/accused.

8. Mr. Menezes then submitted that the learned revisional Court after quashing the Order of issuance of process ought to have remitted the matter to the learned Magistrate for investigation. In support of this submission, he has placed reliance on the decision of the learned Single Judge of this Court in **Vithal Vinayak Bhuskute and others v. Narhari Pandurang Gandale and another,** 1995(3) Bom.C.R. 324. The facts of the aforesaid case are entirely different. In the said case the tenant, that is, the respondent in the High Court had filed three complaint cases in the Court of the Judicial Magistrate, First Class, Pune, against the owner, builder and one Acchyut Bhimaji Kulkarni. The learned Magistrate had called for a report under Section 202 of the Code of Criminal Procedure and as the police

did not submit the report for a long time, the Magistrate, after considering the material available before him, issued process against the accused. In one of the cases the accused therein, namely, the builder and the owner challenged the Order of issuance of process by filing a Criminal Revision Application, before the Additional Sessions Judge, Pune. The learned Additional Sessions Judge dismissed the Criminal Revision Application. The Order of the learned Additional Sessions Judge was, therefore, assailed separately in a Criminal Writ Petition. In another criminal case the Order of the learned trial Magistrate issuing process against the accused was challenged by the builder by filing a Criminal Revision Application. The learned Additional Sessions Judge set aside the Order of the Magistrate issuing process and dismissed the revision. The aforesaid Order of the learned Additional Sessions Judge was also challenged by filing a Criminal Writ Petition. The High Court by the aforesaid Judgment upheld the Order of the learned Magistrate issuing process and declined to interfere in the Criminal Writ Petition challenging the issuance of process. The petition challenging the Judgment of the Additional Sessions Judge quashing the Order of issuance of process was allowed and the complaints were restored to file and were remitted to the appropriate Courts for trial according to law. In the background of the facts

stated in the aforesaid authority, the authority does not support the proposition which is canvassed before me.

9. Mr. Menezes then relied on the Judgment of the learned Single Judge of this Court in **P.K. Ramkrishna and others v. Neelkanth M. Kamble and another,** 1996(5) Bom.C.R. 438. This was also a case where the Magistrate after waiting for some time for the police report had issued process. In the background, therefore, the learned Single Judge of this Court directed the Magistrate to call for the police report and decide the question of issue of process. The facts of the aforesaid authority also do not support the proposition canvassed before me.

10. The question whether the Court has jurisdiction to direct the accused to submit himself to DNA test is not germane for the decision of this revision as this would be a factor which will be decided by the Court in the event the case goes to trial. In the present case the complainant has miserably failed to prima facie demonstrate the involvement of the accused and, therefore, the learned Sessions Judge had rightly quashed the Order issuing process. There was absolutely no material to establish prima facie commission of the offence by the respondent no. 1/accused.

11. After giving my anxious consideration to the rival submissions advanced by the learned counsel for the parties, according to me, the Judgment of the learned Sessions Judge, Panaji, dated 29th September 2001, in Criminal Revision Application No. 70 of 2000, does not warrant any interference and the Criminal Miscellaneous Application is, accordingly, dismissed.

(P.V. HARDAS)
JUDGE.

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